

Message Text

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MUNICH FOR CHARGE

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TAGS: PGOV, CPRS, GW, GE, US

SUBJECT: OVERLAPPING GERMAN CLAIMS

REF: (A) BONN 7557, (B) STATE 54306

1. VON SCHMELING PASSED US TODAY THE FOLLOWING TRANSLATION
OF AN AIDE MEMORIE FROM THE FRG ON OVERLAPPING GERMAN
CLAIMS.

2. QUOTE: UNDER THE PREVAILING CIRCUMSTANCES, THE GOVERN-
MENT OF THE FEDERAL REPUBLIC OF GERMANY IS CURRENTLY NOT
IN A POSITION TO COMPLY WITH THE PROPOSAL MADE BY THE
UNITED STATES GOVERNMENT TO THE EFFECT THAT THE FEDERAL
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GOVERNMENT SHOULD EMPHATICALLY ADVOCATE THE RESUMPTION OF
PAYMENTS BY THE COMPENSATION FUND TO BENEFICIARIES OF THE
UNITED STATES NATIONALITY. IT IS THE VIEW OF THE COMPETENT
AGENCIES OF THE FEDERAL REPUBLIC OF GERMANY THAT THIS
CONSTITUTES A QUESTION OF PRINCIPLE AND THAT ITS CLARIFI-
CATION BY SUPREME COURT DECISION CAN BE WAIVED ONLY IF AN
AGREEMENT IS REACHED WITH THE UNITED STATES GOVERNMENT.

THE FEDERAL GOVERNMENT IS AWARE OF THE NECESSITY OF
ARRIVING AT A SATISFACTORY ARRANGEMENT AS EXPEDITIOUSLY AS

POSSIBLE IN THE INTEREST OF THE BENEFICIARIES, SOME OF WHOM ARE OF ADVANCED AGE. ON THE OTHER HAND, HOWEVER, IT MUST DULY CONSIDER THE FINANCIAL INTERESTS OF THE FEDERAL REPUBLIC OF GERMANY. THIS WOULD NOT BE THE CASE IF THE FEDERAL REPUBLIC WOULD MAKE ADVANCE PAYMENTS TO UNITED STATES NATIONALS FROM THE COMPENSATION FUND TO SETTLE CLAIMS, WHICH FINALLY WOULD HAVE TO BE SATISFIED BY THE GDR UNLESS THERE WOULD BE A GUARANTEE TO THE EFFECT THAT, UPON LATER PAYMENT BY THE GDR TO THE USA, A COMPENSATION WOULD BE MADE IN FAVOR OF THE FEDERAL REPUBLIC. AN OVER-ALL COMPENSATION AMOUNT REDUCED BY PAYMENTS MADE BY THE FEDERAL REPUBLIC OF GERMANY COULD IN FUTURE NEGOTIATIONS WITH THE GDR RESULT IN A LESSER COMPENSATION SUM TO BE CONSIDERED BY THE GDR FOR THE USA.

IT MUST FURTHER BE NOTED THAT THE APPLICATION OF THE MUTUAL LEGAL PROVISIONS COULD RESULT IN AN ESSENTIAL DIS-ADVANTAGE FOR THOSE U.S. NATIONALS AUTHORIZED TO CLAIM DAMAGES IN THE GDR UNDER BOTH THE GERMAN EQUALIZATION OF BURDENS AS WELL AS THE U.S. LAW 94-542. ACCORDING TO THE MENTIONED U.S. LAW, THE GERMAN PAYMENT WOULD HAVE TO BE CONSIDERED A MITIGATION OF DAMAGES AND THE REDUCED AMERILIMITED OFFICIAL USE
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CAN PAYMENT THEN TO BE AWARDED WOULD, UNDER GERMAN LAW, SUBSEQUENTLY HAVE TO BE REDUCED FROM THE COMPENSATION PREVIOUSLY DETERMINED AND THE APPROPRIATE AMOUNT WOULD HAVE TO BE RECLAIMED FROM THE BENEFICIARY. CONSEQUENTLY, THE INDIVIDUAL HAVING A LEGAL CLAIM ALSO UNDER GERMAN LAW, WOULD HAVE A SUBSTANTIAL DISADVANTAGE AS COMPARED TO A CLAIMANT UNDER U.S. LAW ONLY.

IN THE INTEREST OF BOTH OUR COUNTRIES, AND ESPECIALLY IN THE INTEREST OF THE BENEFICIARIES, THE FEDERAL GOVERNMENT THEREFORE RECOMMENDS THE FOLLOWING PROCEDURE:

IN AN EXCHANGE OF NOTES, BOTH SIDES REEMPHASIZE THEIR COMMON VIEW ON THE FACT THAT THE COMPENSATION DESIRED BY THE UNITED STATES FROM THE GDR MUST NOT BE REDUCED BY PAYMENTS MADE FROM THE GERMAN COMPENSATION FUND AND THAT THE FEDERAL REPUBLIC OF GERMANY THUS MAKES ADVANCE PAYMENTS ONLY. THESE ADVANCE PAYMENTS WILL BE REPAID TO THE FEDERAL REPUBLIC OF GERMANY BY THE UNITED STATES FROM THE ANTICIPATED GDR COMPENSATION SUM AND WILL BE CALCULATED ON THE BASIS OF THE PERCENTAGE OF CLAIMANTS UNDER THE LEGAL PROVISIONS OF BOTH COUNTRIES. WITH CONSIDERATION TO THIS INTERGOVERNMENTAL BALANCE, THE FEDERAL REPUBLIC OF GERMANY WILL DISREGARD THE APPLICATION OF ITS REDUCTION PROVISIONS. BOTH SIDES DECLARE THEIR WILLINGNESS TO NEGOTIATE AN

APPROPRIATE AGREEMENT, IF NECESSARY, AFTER CONCLUSION OF THE NEGOTIATIONS BETWEEN THE USA AND THE GDR. THE PRESENT SUSPENSION OF DECISIONS BY THE FEDERAL COMPENSATION OFFICE WOULD BE LIFTED IMMEDIATELY AFTER REALIZATION OF THIS EXCHANGE OF NOTES. UNQUOTE.

3. WE GAVE VON SCHMELING THE FOLLOWING PROVISIONAL REACTIONS, NOTING THAT WE WOULD COMMUNICATE AGAIN ONCE WE CONSULTED WITH FCSC AND REFLECTED ON FRG TEXT FURTHER.

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4. WE EXPRESSED APPRECIATION FOR THE THOUGHT THAT HAD GONE INTO THE FRG PROPOSAL AND STATED THAT ELEMENTS OF IT SHOULD BE ATTRACTIVE TO US. THUS WE AGREE THAT "BOTH SIDES RE-EMPHASIZE THEIR COMMON VIEW ON THE FACT THAT THE COMPENSATION DESIRED BY THE UNITED STATES FROM THE GDR MUST NOT BE REDUCED BY PAYMENTS MADE FROM THE GERMAN COMPENSATION /EQUALIZATION/ FUND...." IN VIEW OF THE CONTINGENT CHARACTER OF EQUALIZATION PAYMENTS, THEY WILL NOT OPERATE TO REDUCE FCSC AWARDS UNDER SECTION 605 OF PL 94-542 NOR AMOUNT CLAIMED OF GDR. WE ALSO THOUGHT THAT AN APPROPRIATE AGREEMENT SHOULD BE NEGOTIATED BETWEEN THE FRG AND USG "AFTER CONCLUSION OF THE NEGOTIATIONS BETWEEN THE USA AND THE GDR." ONCE THE GDR HAS COMMITTED ITSELF TO PAY SOMETHING, THE FRG AND USG TOGETHER CAN SEE WHAT CAN BE DONE. AT THIS JUNCTURE, WE PLACE GREAT VALUE ON THE IMMEDIATE LIFTING OF SUSPENSION OF PAYMENTS AFTER AN EXCHANGE OF NOTES, AN EXCHANGE WE HOPE WE CAN SHORTLY AGREE UPON.

5. OTHER ELEMENTS OF THE FRG PROPOSAL DID NOT APPEAR TO BE PROMISING. IT IS PROPOSED THAT THE UNITED STATES AGREE TO REPAY TO THE FRG ITS ADVANCE PAYMENTS TO CLAIMANTS. WHILE WE AGREE THAT THESE PAYMENTS ARE CONTINGENT AND HENCE ADVANCE PAYMENTS, THE USG COULD NOT NOW AGREE TO REPAY THE FRG THOSE PAYMENTS OUT OF RECEIPTS FROM THE GDR. TO DO SO WOULD REQUIRE AMENDMENT OF PL 94-542, WHICH PROVIDES FOR PAYMENTS EXCLUSIVELY TO "NATIONALS OF THE UNITED STATES" WHICH TERM IS DEFINED TO "NOT INCLUDE ALIENS." THE PAYMENT PROCEDURES OF THE STATUTE DO NOT, IN OUR VIEW, PERMIT THE USG TO PAY ANY PORTION OF AWARDS TO THE FRG.

6. MOREOVER, WE SEE ROOM FOR QUESTIONING A STATUTORY AMENDMENT WHICH WOULD REQUIRE PAYMENT BY THE USG TO THE FRG OF PART OF WHAT MAY ONE DAY BE RECEIVED FROM THE GDR.
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THE DESIRABILITY OF SUCH PAYMENTS COULD BE QUESTIONED IN

CIRCUMSTANCES IN WHICH AN AMERICAN NATIONAL, HAVING RECEIVED SOME 12 PERCENT OF HIS CLAIM FROM THE FRG, RECEIVES, SAY, SOME 5 PERCENT MORE FROM THE GDR. BUT WHATEVER CONCLUSION

WE SHOULD REACH ON SUCH A PROCEDURE, WE HAVE DIFFICULTY IN ENVISAGING THE CONGRESS VOTING TO ENDORSE IT BY THE REQUISITE STATUTORY AMENDMENT. IT WOULD BE ESPECIALLY UNLIKELY TO DO SO IN VIEW OF THE OPPOSITION OF THE CLAIMANTS AND ORGANIZATIONS WHO SPEAK FOR THEM. MOREOVER, SEEKING LEGISLATION WOULD INFORM THE GDR OF WHAT IS UP, WHICH WOULD PREJUDICE SUCH CHANCES AS THERE MAY BE OF THE GDR PAYING ANYTHING ON CLAIMS OF U.S. NATIONALS.

7. VON SCHMELING RECEIVED THESE POINTS SYMPATHETICALLY. HE STATED THAT HE UNDERSTOOD THAT QUESTION ABOUT THE EQUITY OF REPAYMENT TO THE FRG IN SUCH CIRCUMSTANCES COULD BE RAISED. NEVERTHELESS, IT APPEARED THAT HIS GOVERNMENT BELIEVES THAT THE QUESTION OF SUSPENSION OF PAYMENTS MUST AS A MATTER OF PRINCIPLE BE PURSUED TO THE FRG SUPREME COURT UNLESS AGREEMENT CAN BE REACHED WITH THE USG. WHAT CAN THE CONTENT OF SUCH AN AGREEMENT BE IN VIEW OF THE FRG REJECTION OF OUR EARLIER PROPOSAL AND THE LIKELY USG REJECTION OF THAT OF THE FRG?

8. WE REPLIED THAT A POSSIBILITY WE WISHED TO PROPOSE IS TO TAKE OUR EARLIER PROPOSAL (REFTEL B, PARAGRAPH 7) AND ADD TO IT LANGUAGE OF THE FOLLOWING SUBSTANCE: "THE USG WILL ALSO BE PREPARED TO DRAW TO THE ATTENTION OF U.S. NATIONALS WHO RECEIVE PAYMENTS FROM THE GDR THE RELEVANT PROVISIONS OF LAW OF THE FRG." WE EXPLAINED THAT THE FCSC, IN INFORMING CLAIMANTS OF THEIR AWARDS, COULD ROUTINELY INCLUDE SUCH A STATEMENT IN THE NOTIFICATION.

9. VON SCHMELING SAID THAT HE WOULD TRANSMIT THIS
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SUGGESTION.

10. IN RESPECT OF VON SCHMELING'S REMARK ABOUT NECESSITY OF RESORT TO SUPREME COURT, WE NOTED THAT THE COURT IN THE FREYMUTH CASE HAD FOUND THE GOVERNMENT'S CASE FOR CONTINUED SUSPENSION SO WEAK AS TO DENY THE RIGHT OF APPEAL AND THAT NOW THE BAA IS SEEKING PERMISSION TO APPEAL. ON THE FACE OF IT, IT IS NOT EASY TO SEE THE PRINCIPLE AT STAKE WHICH JUSTIFIED THE FRG IN TAKING THIS ROUTE. VON SCHMELING DID NOT DEMUR.

11. WE REQUEST THAT EMBASSY CONVEY TO RUMPF AND OTHERS AS APPROPRIATE THE SUBSTANCE OF THIS MESSAGE, EMPHASIZING THAT USG IS UNABLE TO GIVE AN UNDERTAKING TO PAY OVER ANY PART

OF GDR RECEIPTS TO THE FRG; THAT TO DO SO WOULD REQUIRE
LEGISLATION; THAT WE ARE DISINCLINED TO SEEK SUCH LEGISLA-
TION; BUT EVEN IF WE WERE TO SEEK IT, WE DO NOT BELIEVE
WE WOULD GET IT. YOU SHOULD ADD THAT LEGISLATION OF THIS

KIND WOULD PREJUDICE POSSIBILITIES OF REACHING A CLAIMS
SETTLEMENT WITH THE GDR AND, FINALLY, IF THERE IS TO BE
LEGISLATION, THAT IT IS LIKELIER TO BE LEGISLATION STIMULA-
TED BY REPRESENTATIVES OF CLAIMANTS WHICH WILL SIMPLY EX-
CLUDE FROM THE FCSC PROGRAM CLAIMS OF PERSONS WHO HAVE
AWARDS UNDER THE FRG EQUALIZATION PROGRAM. THAT WOULD
REMOVE ANY BASIS FOR CONTINUED SUSPENSION OF FRG PAYMENTS,
BUT NOT IN THE OPTIMUM WAY. YOU SHOULD URGE, IN VIEW OF
THESE CONSIDERATIONS, THAT FRG GIVE THE MOST EARNEST AND
SYMPATHETIC CONSIDERATION TO OUR PROPOSAL REVISED AS
ABOVE. VANCE

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